IN THE UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

UNITED STATES, **Appellant**	)	**BRIEF ON BEHALF OF APPELLANT**
v.	)	
Staff Sergeant (E-6) **ISAC D. MENDOZA,** **United States Army,** **Appellee**	)	**Crim. App. Dkt. No. 20210647**
	)	**USCA Dkt. No. 25-0244/AR**

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Index of Brief

Index of Brief ii

Table of Authorities iv

Statement of Statutory Jurisdiction 1

Statement of the Case 2

Summary of Argument 3

Statement of Facts 4

A. Events prior to the sexual assault 4

B. Appellee sexually assaulted the victim without her consent 5

C. Appellee's admission to CID 6

D. The trial 8

E. Trial defense counsel's motions regarding notice and due process 9

Certified Issue I: WHETHER APPELLANT'S CONVICTION SHOULD BE REVERSED FOR A DUE PROCESS VIOLATION? 10

Standard of Review 10

Law 11

Arugment 11

A. There was no violation of Appellee's due process right to fair notice 11

B. Remedy 12

Certified Issue II: WHETHER THE ARMY COURT ERRED IN ITS APPLICATION OF THE LAW IN FINDING THAT THE CONVICTION WAS LEGALLY AND FACTUALLY SUFFICIENT ?. 14

Standard of Review 14

Law and Discussion 14

A. Legal Sufficiency 14

B. Factual Sufficiency 16

C. Article 120(b)(2)(A), UCMJ 16

Argument 18

This case is legally and factually sufficient 18

Certified Issue III: WHETHER THE ARMY COURT ERRED IN ITS APPLICATION OF THE LAW IN APPLYING A "MAINLY BUT ALONGSIDE OTHER EVIDENCE" FRAMEWORK TO FIND APPELLANT'S CONVICTION LEGALLY SUFFICIENT? 21

Law and Argument 21

A. The Army court's decision in *United States v. Roe* is good law 21

B. The holding in *Roe* applies to this case 22

C. The Army court applied its *Roe* framework correctly 24

Conclusion 24

Table of Authorities

Supreme Court of the United States
United States v. Delaware v. Van Arsdall, 475 U.S. 673, 681 (1986) 13

U.S. Court of Appeals for the Armed Forces
United States v. Dykes, 38 M.J. 270 (C.M.A. 1993) 14
United States v. Erickson, 65 M.J. 221 (C.A.A.F. 2007) 11
United States v. Gonzalez, __ M.J. ___ (C.A.A.F. 2025).....10
United States v. Griffin, 502 U.S. 46 (1991) 12
United States v. Hills 75 M.J. 350 (C.A.A.F. 2016) 12
United States v. Jones, 68 M.J. 465 (C.A.A.F. 2010) 12
United States v. King, 78 M.J. 218 (C.A.A.F. 2019) 15
United States v. Mann, 54 M.J. 164 (C.A.A.F. 2000) 11
Unites States v. Mendoza, 85 M.J. 213 (C.A.A.F. 2024) 11
United States v. Nicola, 78 M.J. 223 (C.A.A.F. 2019) 14
United States v. Robinson, 77 M.J. 294 (C.A.A.F. 2018) 15
United States v. Riggins, 75 M.J. 78 (C.A.A.F. 2016) 12
United States v. Rocha, 84 M.J. 346 (C.A.A.F. 2024) 10
United States v. Rosario, 76 M.J. 114 (C.A.A.F. 2017) 14
United States v. Tovarchavez, 78 M.J. 458 (C.A.A.F. 2019) 10
United States v. Tunstall, 72 M.J. 191 (C.A.A.F. 2013) 11
United States v. Washington, 57 M.J. 394 (C.A.A.F. 2002) 14
United States v. Wilkins, 71 M.J. 410 (C.A.A.F. 2012) 10

U.S. Court of Military Appeals
United States v. Sell, 3 U.S.C.M.A. 202, 11 C.M.R. 202 (C.M.A. 1953) 11

Service Courts of Criminal Appeals
United States v. Coe, 84 M.J. 537 (Army Ct. Crim. App. 2024) 23
United States v. Cooper, 80 M.J. 644 (N-M Ct. Crim. App. 2020) 13
United States v. Davis, 75 M.J. 537 (Army Ct. Crim. App. 2015) 16
United States v. Roe, ARMY 20200144, 2022 CCA LEXIS 248 (Army Ct. Crim. App. Apr. 27, 2022) 21

Uniform Code of Military Justice
Article 120, UCMJ; 10 U.S.C. § 920.....2

Military Rules and Regulations
Rules of Court Martial 917 3

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TO THE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES:

Certified Issues

I. WHETHER APPELLANT'S CONVICTION SHOULD BE REVERSED FOR A DUE PROCESS VIOLATION?

II. WHETHER THE ARMY COURT ERRED IN ITS APPLICATION OF THE LAW IN FINDING THAT THE CONVICTION WAS LEGALLY AND FACTUALLY SUFFICENT?

III. WHETHER THE ARMY COURT ERRED IN ITS APPLICATION OF THE LAW IN APPLYING A "MAINLY BUT ALONGSIDE OTHER EVIDENCE" FRAMEWORK TO FIND APPELLANT'S CONVICTION LEGALLY SUFFICIENT?

Statement of Statutory Jurisdiction

The Army Court of Criminal Appeals (Army Court) had jurisdiction over this matter pursuant to Article 66, Uniform Code of Military Justice [UCMJ]; 10

U.S.C. § 866 (2019).[1] This Honorable Court has jurisdiction over this matter under Article 67(a)(3), UCMJ, 10 U.S.C. § 867(a)(3) (2024).

Statement of the Case

On December 8, 2021, a military judge sitting as a general court-martial convicted Appellee, contrary to his pleas, of one specification of sexual assault in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920 [UCMJ].[2] (JA 73). On the same day, the military judge sentenced Appellee to a reduction to the grade of E-1, confinement for thirty months, and a dishonorable discharge. (JA 75). On January 6, 2022, the convening authority took no action on the findings and approved the sentence. (JA 76). The military judge entered judgment on January 12, 2022. (JA 72).

On May 8, 2023, the Army Court affirmed the findings and sentence. (JA 51). On October 7, 2024, this Court set aside the Army Court's decision and remanded the case for a new factual and legal sufficiency review. (JA 07). On June 27, 2025, the Army Court reaffirmed the findings and sentence. (JA 61). On August 19, 2025, The Judge Advocate General of the United States Army certified three issues to this Court for review, which this Court docketed on August 20,

[1] Unless otherwise stated, all references to the UCMJ and Rules for Courts-Martial [R.C.M.] are to the versions in the *Manual for Courts-Martial*, United States (2019 ed.) [*MCM*].

[2] The military judge found appellant not guilty of one specification of abusive sexual contact in violation of Article 120, UCMJ. (JA 16).

2025. (JA 01, 03).

Summary of Argument

Appellee's conviction is legally and factually sufficient based on the victim's intoxication, testimony, and appellee's statements. While the prosecution's misapplication of "competent person" in defining consent raised due process concerns, the manner in which the case was contested dispels any argument that Appellee was not on notice as to what he had to defend against. The Army court was within their discretion to determine that the fair notice concerns did not warrant setting aside the findings and ordering a rehearing.

Appellee's conviction for sexual assault was legally and factually sufficient based on the evidence presented at trial. The victim's testimony and the objective evidence regarding her state of intoxication, along with appellant's admissions, false exculpatory statements, and inconsistencies provided a sufficient basis for any rational factfinder to have found all essential elements of sexual assault without consent beyond a reasonable doubt. Although the victim had no memory of the sexual assault, the government presented sufficient circumstantial evidence, in addition to the evidence of the victim's intoxication, that she did not, in fact, consent to any sexual acts with Appellee.

Although the evidence is otherwise legally and factually sufficient, the arguments put forth by the prosecution, in its pretrial motions and in response to

trial defense counsel's Rules for Court Martial (R.C.M.) 917 motion, could have led the military judge to improperly consider evidence that the victim's severe level of intoxication proved that she was incompetent, incapable of consenting, and therefore, did not consent.[3] This is especially true where the prosecution expressly linked the evidence of severe intoxication to the term "competent person," rather than one of the "surrounding circumstances" that the factfinder could weigh when determining whether the victim did, in fact, consent. This Court's subsequent clarification of the term "competent person" within the definition of consent raises due process concerns, but ultimately, the Army Court has the discretion to determine the military judge properly considered the evidence and affirm the conviction.

Statement of Facts

A. Events prior to the sexual assault.

On the night of July 11, 2020, and into the early morning of July 12, 2020, the victim, a Specialist (SPC) in the U.S. Army deployed to Camp Casey, Korea, drank alcohol off-post and returned to her barracks. (JA 95–97). The victim continued drinking and showed signs of intoxication, including slurred speech, poor balance, and difficulty walking. (JA 197). After watching the victim flirt with

[3] The government does not imply that these arguments were made to intentionally mislead the military judge but were merely based on a plain meaning of the terms in that portion of the statute.

another male soldier, Appellee told the soldier she was "too intoxicated" and said he would send her to her room. (JA 143–48; JA 288; Pros. Ex. 1 at 11:27–12:47). Less than ten minutes later, Appellee met the victim in a hallway, invited her into his room in the same barracks building, and she accepted. (JA 288; Pros. Ex. 1 at 13:40–14:18; JA 289 at 1:26:22–44). Appellee touched the victim's groin while walking to his room. (JA 288; Pros. Ex. 1 at 14:06–14:10).

B. Appellee sexually assaulted the victim without her consent.

About an hour after they entered his room, closed circuit television (CCTV) footage showed Appellee walking the victim with her arms around his shoulders and her body slumped against him for support to her room. (JA 288; Pros. Ex. 1 at 14:19–16:30). Appellee put the victim inside of her room and returned to his room. (JA 288; Pros. Ex. 1 at 14:19–16:30).

Within minutes, Appellee retrieved a master key from the charge of quarters (CQ) soldier, opened the victim's door, and returned her hat. (JA 126–27; JA 288–89; Pros. Ex. 1 at 16:39–19:24; Pros. Ex. 2 at 1:33:30–55, 2:43:29–2:45:00). Later that morning, he went back to the victim's room and returned her shoes. (JA 97–98, 127–28; JA 288; Pros. Ex. 1 at 21:13–22:13).

The victim testified she blacked out at some point that night. (JA 97, 111). She next remembered Appellee knocking on her door the following morning to return her shoes. (JA 97–98). Afterwards, the victim noticed that she was not

wearing the bra or underwear from the night before. (JA 98–99, 108, 119–20). Also, the tampon that the victim inserted the day prior was pushed inside her body, beyond reach. (JA 98–99, 108, 119–20). The victim testified that she has never inserted tampons to the point that the string was fully inside of her body. (JA 99, 109, 120–21, 124). The victim also stated that she would not have sex while on her period. (JA 99, 109, 120–21, 124). Crying and confused, the victim reported to her unit and the CQ soldier, who arranged a sexual assault forensic examination (SAFE). (JA 171, 187–89, 199–200, 36).

That morning when SPC RL —the victim's friend —confronted Appellee, Appellee appeared nervous and admitted that the victim had fallen asleep in his bed. (JA 152–53). Appellee then followed SPC RL to the troop medical clinic, where the victim underwent her SAFE. (JA 130–31, 178). While there, SPC RL called the victim, handed the phone to Appellee, and Appellee told the victim—who was trying to understand what had happened—that nothing occurred, except that she had locked herself in the bathroom at one point. (JA 42–45).

C. Appellee's admissions to CID.

At the Medical Treatment Facility (MTF) parking lot, Appellee told CID Special Agent (SA) DW that the victim was in his room at some point but that he

did not know why.[4] (JA 148–49). Later that day, Appellee waived his Article 31, UCMJ rights at the CID office. (JA 290; JA 389; Pros. Ex. 2 at 34:24–40:00; Pros. Ex. 5). Appellee first claimed he did not remember events from the previous night because he "blacked out quite a bit." The last thing Appellee said he remembered was the victim falling in his bathroom, propping her up and taking her to her room. (JA 289; Pros. Ex. 2 at 43:30–46:06).

Appellee again told SA DW that he did not know how the victim entered his room. (JA 289; Pros. Ex. 2 at 1:18:13–26). He later admitted that he invited the victim after she hit on him. (JA 289; Pros. Ex. 2 at 1:24:10–1:26:44). Appellee described the victim as stumbling and "super drunk," which forced him to walk her to her room. (JA 289; Pros. Ex. 2 at 1:28:40–1:31:00). Yet, Appellee also claimed the victim walked "perfectly fine," had her arm around him only for "comfort," and did not need his support. (JA 289; Pros. Ex. 2 at 1:39:19–1:40:15). Appellee insisted they "didn't have any sexual contact of any kind." (JA 289; Pros. Ex. 2 at 1:28:20–37). Despite claiming memory lapses, Appellee recounted in detail the sequence of events, people present, and locations for about two hours. (JA 289; Pros. Ex. 2 at 50:19–2:43:22).

When SA DW showed Appellee CCTV footage of him touching the victim's

[4] Appellee was not under investigation or a suspect at this time. SA DW was conducting a canvas when Appellee made voluntary statements.

groin, Appellee changed his account. (JA 289; Pros. Ex. 2 at 3:16:20–55). Appellee admitted the victim fell asleep on his bed with a drink in her hand. (JA 289; Pros. Ex. 2 at 3:28:00–3:38:47). Appellee admitted that he woke the victim up and had sexual intercourse with her. (JA 289; Pros. Ex. 2 at 3:28:00–3:38:47). He admitted he "was in control the whole time," and knew the victim could not consent because of intoxication. (JA 289; Pros. Ex. 2 at 3:28:00–3:38:47). Appellee admitted that he knew it was wrong to commit sexual acts under those circumstances. (JA 289; JA 292; Pros. Ex. 2 at 3:28:00–3:38:47; Pros. Ex. 6 at 2). Appellee also admitted that he removed the victim from his room because he "didn't want to incriminalize (sic) himself." (JA 289; Pros. Ex. 2 at 2:17:24–30).

Appellee said he "made the conscious decision to just do it," and that he "didn't think about how [the victim] was" when asked about his reasoning for sexually assaulting the victim. (JA 289; Pros. Ex. 2 at 3:39:48–3:41:00). Appellee acknowledged, "I didn't just make a mistake, I committed . . . a severe felony." (JA 289; Pros. Ex. 2 at 3:43:17–24). He then wrote and swore to a statement confirming these admissions. (JA 289; JA 292; Pros. Ex. 2 at 4:07:40–5:08:52; Pros. Ex. 6).

Although Appellee claimed the victim kissed him and said "yes" when he asked, "is this okay" during the encounter, (JA 289; Pros. Ex. 2 at 3:20:00–31), he later conceded "yeah" when SA DW told him, "She didn't say yes, and you know

that." (JA 289; Pros. Ex. 2 at 3:27:29–36).

D. The trial.

The prosecutor called Dr. RW, a forensic psychology expert on alcohol's effects on behavior as an expert witness. (JA 252). Dr. RW estimated the victim's blood alcohol concentration (BAC) to be at .175 to .19, when Appellee sexually assaulted her. (JA 252, 255–56). Dr. RW testified that this BAC, combined with the victim's other symptoms, aligned with a blackout, impaired decision making, difficulty processing information, and diminished mental capacity. (JA 258).

During pretrial litigation, defense counsel moved to strike the term "competent person" from the definition of consent. (JA 298–309). The government opposed. (JA 310–15). The issue became moot after Appellee changed his forum selection, but the military judge stated he would allow defense to argue the point in closing and would address it during deliberations. (JA 81–2).

E. Trial defense counsel's motions regarding notice and due process.

During pretrial litigation, trial defense counsel motioned the military judge for a tailored instruction to address his due process concerns. (JA 298–309). The government responded to that motion and argued that the plain language and definition of consent put Appellee on notice that he had to defend against a theory that the victim must be competent to consent. (JA 310–15). The military judge did not rule on the defense motion because the issue of instruction was mooted when

Appellant elected trial by military judge alone. Instead, he stated that counsel could argue the motion in their closing arguments. (JA 82–3). At the conclusion of the government's case, trial defense counsel renewed their motion and moved for a dismissal of the charges. (JA 266–67). The government argued that "there has been certainly some evidence presented by the prosecution's case that there was no consent" and "the statutory definition of consent regarding a competent person has certainly been established in this case." (JA 266–67). The military judge stated, "I tend to agree with the government that there is some [] evidence of [] each of the elements of both specifications. . . . So the motion is denied." (JA 266–67).

Certified Issue I

WHETHER APPELLANT'S CONVICTION SHOULD BE REVERSED FOR A DUE PROCESS VIOLATION?

Standard of Review

When the issue of fair notice is raised for the first time on appeal, this Court reviews the forfeited issue for plain error. *United States v. Gonzalez*, __ M.J. ___ (C.A.A.F. 2025) (citations omitted).

Under plain error review, Appellee has the burden of demonstrating that: "(1) there was error; (2) the error was plain or obvious; and (3) the error materially prejudiced a substantial right of [Appellee]." *United States v. Rocha*, 84 M.J. 346 (C.A.A.F. 2024); *United States v. Wilkins*, 71 M.J. 410, 412 (C.A.A.F. 2012).

However, in those instances where a clear or obvious error rises to the level of a constitutional violation, the burden shifts to the government to "show that the error was harmless beyond a reasonable doubt." *United States v. Tovarchavez*, 78 M.J. 458, 462–63 (C.A.A.F. 2019).

Law

> The due process principle of fair notice mandates that an accused has a right to know what offense and under what legal theory he will be convicted. The Due Process Clause of the Fifth Amendment also does not permit convicting an accused of an offense with which he has not been charged.

United States v. Tunstall, 72 M.J. 191, 192 (C.A.A.F. 2013). A specification is sufficiently specific if it "informs an accused of the offense against which he or she must defend and bars a future prosecution for the same offense." *United States v. Sell*, 3 U.S.C.M.A. 202, 11 C.M.R. 202, 206 (C.M.A. 1953).

Argument

This Court should affirm the Army Court's decision as it properly applied this Court's decision in *Mendoza I*.

A. There was no violation of Appellee's due process right to fair notice.

This Court's ruling prior to remand exposed an ambiguity regarding how the prosecution misinterpreted and potentially misapplied evidence of the victim's

intoxication in Appellee's case.[5] *Mendoza*, 2024 CAAF LEXIS 590, *19–20. Namely, trial counsel's conflated arguments and the possibility that the military judge may have convicted Appellee of sexual assault on the theory that the victim was *incapable of consenting* without the Government proving he knew or should have known she was incapable raised "serious due process *concerns*." *Mendoza*, 2024 CAAF LEXIS 590, *12–14, n.4 (emphasis added).

But these concerns are overcome because the record demonstrates Appellee was on notice he needed to defend himself from the Government's allegation that the victim was a competent person who did not consent. (App. Ex. IX; XIII; R. at 18, 247, 249, 250). Here, Appellee was on notice by the charge sheet, the statutory definition of "consent," and the evidence presented during discovery and at trial. (JA 70). Appellee was not charged with one offense and convicted of another. *Cf. United States v. Jones*, 68 M.J. 465 (C.A.A.F. 2010) (finding nothing in the charge put the appellant on notice he needed to defend against a lesser included offense); *United States v. Riggins*, 75 M.J. 78, 84–85 (C.A.A.F. 2016) (finding the lack of notice exacerbated by the military judge applying a legal theory that ran counter to what the Government alleged in its charging documents). Instead, Appellee was charged and convicted under Article 120(b)(2)(A). (JA 70). The UCMJ defines

[5] The government does not imply that this will be true in all cases in which the government used evidence of a victim's intoxication to prove the absence of consent.

consent as "a freely given agreement to the conduct at issue by a *competent* person" and explains that "an *incompetent* person cannot consent." UCMJ art. 120(g)(7)(A)–(B). Moreover, while counsel conflated two legal theories in argument, there was proper evidence to support the conviction under Article 120(b)(2)(A), UCMJ. Therefore, Appellee had fair notice of the offense of which he was charged.

B. Remedy

If the Court finds that there is plain and obvious constitutional error that contributed to the verdict obtained, this Court should set aside the findings without prejudice and authorize a rehearing in accordance with its opinion. *See* UCMJ art. 867(d); *United States v. Hills*, 75 M.J. 350, 357 (C.A.A.F. 2016) (setting aside the finding and sentence and authorizing a rehearing where the CAAF could not say the military judge's erroneous instruction was harmless beyond a reasonable doubt).[6]

[6] Procedurally, the Army Court should have performed a due process violation analysis as well as a legal and factually sufficiency analysis. "[T]he best practice for a service court of criminal appeals is to simply not comment on the legal and factual sufficiency of findings in a case where a remand is ordered." *United States United States v. Cooper*, 80 M.J. 644, 677 (N-M Ct. Crim. App. 2020) ("[T]he record is flawed enough in some way for a remand, so evaluating the legal and factual sufficiency is somewhat distorted through the prism of the legal error."). Nevertheless, this Court directed the Army Court to conduct a legal and factual sufficiency review, and they complied. The Army Court's decision to proceed with sufficiency review without considering whether Appellee's due process right to

Certified Issue II

WHETHER THE ARMY COURT ERRED IN ITS APPLICATION OF THE LAW IN FINDING THAT THE CONVICTION WAS LEGALLY AND FACTUALLY SUFFICENT?

Standard of Review

Questions of legal and factual sufficiency are reviewed de novo. *United States v. Rosario*, 76 M.J. 114 (C.A.A.F. 2017) (citation omitted);[7] *United States v. Washington,* 57 M.J. 394, 399 (C.A.A.F. 2002). Further, this Court's assessment of factual sufficiency is limited to the evidence produced at trial. *United States v. Dykes*, 38 M.J. 270, 272 (C.M.A. 1993) (citations omitted).

Law

A. Legal Sufficiency.

Findings of guilt are legally sufficient when "any rational [factfinder] could have found all essential elements of the offense beyond a reasonable doubt." *United States v. Nicola*, 78 M.J. 223, 226 (C.A.A.F. 2019) (citations omitted). When this Court conducts a legal sufficiency review, it is obligated to draw "every

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fair notice was violated was a reasonable interpretation of this Court's remand order.

[7] The amended Article 66(d)(1), UCMJ (2021) does not apply in this case because the findings of guilty in the Entry of Judgment are for offenses that occurred before 1 January 2021. (JA 72–3). *See generally* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 542(e)(2), 134 Stat. 3388, 3611–123.

reasonable inference from the evidence of record in favor of the prosecution." *United States v. Robinson*, 77 M.J. 294, 298 (C.A.A.F. 2018) (citations omitted). "As such, the standard for legal sufficiency involves a very low threshold to sustain a conviction." *United States v. King*, 78 M.J. 218, 221 (C.A.A.F. 2019). Reasonable doubt "does not mean that the evidence must be free from any conflict or that the trier of fact may not draw reasonable inferences from the evidence presented." *King*, 78 M.J. at 221.

This Court "has repeatedly held that the Government may meet its burden of proving an accused's guilt beyond a reasonable doubt with circumstantial evidence." *United States v. Mendoza*, 85 M.J.213, 2024 CAAF LEXIS 590, *10 (C.A.A.F. 2024) (citing *United States v. Long*, 81 M.J. 362, 368 (C.A.A.F. 2021); *King*, 78 M.J. at 221. "The President has instructed that findings of guilt 'may be based on direct or circumstantial evidence,' without mention of any exception for certain offenses." *Id*. (citing Rule for Court Martial [R.C.M.] 918(c)). The President's instructions and the CAAF's case law are consistent with the Supreme Court's guidance that circumstantial evidence "is intrinsically no different from testimonial evidence." *Id*. at *11 (citing *Holland v. United States*, 348 U.S. 121, 140, (1954)). "Accordingly, we reiterate once again that the absence of direct evidence of an element of an offense does not prevent a finding of guilty for that offense from being legally sufficient." *Id*. at *11.

B. Factual Sufficiency.

Findings of guilt are factually sufficient when "after weighing the evidence in the record of trial and making allowances for not having personally observed the witnesses, the members of the service court are themselves convinced of [the Appellee's guilt beyond a reasonable doubt." *King*, 78 M.J. at 221 (quoting *United States v. Oliver*, 70 M.J. 64, 68 (C.A.A.F. 2011)). This court takes "a fresh, impartial look at the evidence," applying "neither a presumption of innocence nor a presumption of guilt." *United States v. Washington*, 57 M.J. 394, 399 (C.A.A.F. 2002). The degree of deference this court affords the trial court for having seen and heard the witnesses will typically reflect the materiality of witness credibility to the case. *United States v. Davis*, 75 M.J. 537, 546 (Army Ct. Crim. App. 2015).

C. Article 120(b)(2)(A), UCMJ.

Any person subject to the Manual for Courts-Martial, United States [MCM], pt. IV, ¶ 60.b.(2)(d) (2019 ed.) who commits a sexual act upon another person without the consent of the other person or when the other person is incapable of consenting to the sexual act due to a specified reason is guilty of sexual assault. *See* UCMJ art. 120(b)(2)–(3), UCMJ. "Without consent" and "incapable of consent" are two distinct theories. *Mendoza*, 2024 CAAF LEXIS 590, *17. "Without consent" criminalizes the performance of a sexual act upon a victim who is capable of consenting but does not consent. *Id*.

The elements of the "without consent" theory are: (1) that Appellee committed a sexual act upon the victim; and (2) that he did so without the consent of the victim. UCMJ art. 120(b)(2)(A), 10 U.S.C. §920 (B)(2)(A) (2025); Manual for Courts-Martial, United States [MCM], pt. IV, ¶ 60.b.(2)(d) (2019 ed.); Dep't of Army, Pam. 27-9, Legal Services: Military Judges' Benchbook, para. 3A-44-2 (29 Feb. 2020) [Benchbook]. The term "without" is "used as a function word to indicate the absence or lack of something or someone."[8]

"Consent" is defined as "a freely given agreement to the conduct at issue by a competent person."[9] UCMJ art. 120(g)(7)(A). "Lack of verbal or physical resistance does not constitute consent." *Id.* "An expression of lack of consent through words or conduct means there is no consent." *Id.* "[A]n incompetent person cannot consent." UCMJ art. 120(g)(7)(B).

Further, "[a]ll the surrounding circumstances are to be considered in determining whether a person gave consent."[10] UCMJ art. 120(g)(7) (C), UCMJ.

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[8] *See* Merriam-Webster Unabridged Online Dictionary, http://unabridged.merriam-webster.com/unabridged/without (last visited Sep. 20, 2025).

[9] Congress amended subsection (b) of section 920 of Title 10, United States Code, by repealing the "bodily harm" language and adding "without the consent of the other person." National Defense Authorization Act for Fiscal Year 2017 Conference Report to Accompany S. 2943, 114 H. Rpt. 840. Although Congress amended the definition section of consent between 2016 and 2019, they did not amend the language at issue— "consent means a freely given agreement to the conduct at issue by a competent person." UCMJ art. 120(g)(7)(A).

[10] Additionally, "[a] sleeping, unconscious, or incompetent person cannot consent,"

And although evidence of a victim's intoxication is one relevant "surrounding circumstance" in determining whether the victim consented, intoxication may not be used to prove that a victim was incapable of consenting, and therefore did not consent. *Mendoza*, 2024 CAAF LEXIS 590, at *17–18.

Argument

The Army court did not err. The evidence that Appellee committed a sexual act upon the victim without her consent included

> (1) testimony that the victim had no prior relationship with Appellee; (2) testimony that the victim would never have sex while on her period; (3) testimony that the victim would not have pushed a tampon so far inside of herself; (4) testimony that the victim made a morning-after report to the CQ desk after she realized something was wrong; (5) testimony that the victim was upset; (6) testimony that Appellee initially denied that he had engaged in any sexual acts with the victim; and (7) testimony that the victim locked herself in Appellee's bathroom.

Mendoza, 2024 CAAF LEXIS 590, *19. (JA 07). "Even though there is no direct evidence that Appellant engaged in sexual intercourse 'without the consent' of the victim, the Government presented significant circumstantial evidence on the point." *Id.*

The victim's testimony that she had never spoken to Appellee, never would

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and the term "incapable of consenting" is defined as someone who is "incapable of appraising the nature of the conduct at issue; or physically incapable of declining participation in, or communicating [unwillingness] to engage in, the sexual act at issue." UCMJ art. 120(g)(8).

have sexual intercourse on her period, and never would have had sex with her tampon in, all make it less likely that she consented to sexual acts with him. (R. at 34, 56, 60); *see Flores*, 82 M.J. at 743 (finding that the victim's testimony that she "never, within her abilities of recall, had any desire or intent to engage in sexual activity with Appellant, nor had any physical attraction to him" to be "strong circumstantial evidence"). This evidence is more compelling when juxtaposed to Appellee's evolving story about the victim allegedly being the sexual aggressor.

The Army Court relied on the fact that Appellee's changing narrative was evidence of false exculpatory statements, which this Court also considered as substantive evidence of Appellee's guilt. (JA 51). "[A] false exculpatory statement also may provide relevant circumstantial evidence, namely, evidence of a consciousness of guilt." *United States v. Quezada*, 82 M.J. 54, 59 (C.A.A.F. 2021). Specifically, that "after being confronted, appellant's narrative evolved from him having no idea what happened, to the victim just falling asleep in his bed, to the victim then locking herself in his bathroom, to her then taking a shower and putting her shirt on backwards." (JA 289; Pros. Ex. 2 at 3:28:00–3:38:47).

Appellee admits the victim was falling asleep and he woke her up just prior to the sexual assault. (JA 289; JA 292; Pros. Ex. 2 at 3:28:00–3:38:47; Pros. Ex. 6 at 2). Appellee conceded that the victim did not reply, "yes" to him asking her if "this was okay." (JA 289; Pros. Ex. 2 at 3:27:29–36). Appellee's initial denial that

any sexual acts occurred certainly is evidence of his consciousness of guilt, generally. (JA 289; Pros. Ex. 2 at 1:28:20–37). However, Appellee's admission that the victim actually *did not* say "yes" in response to him asking "is this okay" during the sexual encounter, (JA 289; Pros. Ex. 2 at 3:20:00–31), is significant evidence that the victim never actually gave Appellee verbal consent, regardless of whether *he believed* she was capable of doing so.[11] (JA 289; Pros. Ex. 2 at 3:27:29–36). Specifically, during the CID interview, SA DW asserted "she didn't say yes, and you know that," Appellee said "yeah" and nodded in assent. (JA 289; Pros. Ex. 2 at 3:27:29–36). Importantly, Appellee's admissions that "he was in control the whole time," the victim was "falling asleep," throwing up, and eventually locked herself in his bathroom, presents a clear path for the factfinder to find that Appellee performed the sexual acts on the victim without her consent. (JA 289; JA 292; Pros. Ex. 2 at 3:28:00–3:38:47; Pros. Ex. 6 at 2). These facts directly contradicted the defense's theory of the case—that the victim was a willing and active participant in the sexual acts.

Of course, someone who is falling asleep or throwing up is certainly less likely to *give* consent to sexual acts then someone who is awake and alert. *See*

[11] The government is not required to prove verbal or physical resistance to prove a lack of consent. UCMJ art. 120(g)(7)(A); *see United States v. Weiser*, 80 M.J. 635, 642 (C.G. Ct. Crim. App. 2020) ("Still, verbal or physical resistance is not required to show a lack of consent.").

Weiser, 80 M.J. at 642 ("[T]he combination of [the victim's] consumption of alcohol, level of intoxication, and fatigue were not intended to prove incapacity, but were, instead, relevant 'surrounding circumstances' for the members to consider in deciding whether [she] actually consented."). Similarly, a reasonable inference was that the victim "locked herself" in Appellee's bathroom because she was trying to get away from Appellee. The fact that she did not seek Appellee's assistance while highly intoxicated but rather sought to put a locked door between her and Appellee is (at least) circumstantial evidence that she did not "freely . . . agree []" to what had just occurred. *See* UCMJ art. 120(g)(7)(A).

Appellee's actions after the sexual assault also show that the victim did not consent the previous night. Appellee's overwhelming feelings of guilt and need to probe the victim for information contradict his story that she was a willing participant in the sexual acts.

Certified Issue III

WHETHER THE ARMY COURT ERRED IN ITS APPLICATION OF THE LAW IN APPLYING A "MAINLY BUT ALONGSIDE OTHER EVIDENCE" FRAMEWORK TO FIND APPELLANT'S CONVICTION LEGALLY SUFFICIENT?

Law and Argument

A. The Army court's decision in *United States v. Roe* is good law.

In *United States v. Roe*, the appellant raised a due process claim. ARMY

20200144, 2022 CCA LEXIS 248 (Army Ct. Crim. App. Apr. 27, 2022) (mem. op.), *rev. denied by United States v. Roe*, 83 M.J. 83, 2022 CAAF LEXIS 770 (C.A.A.F. 2022). Namely, Private First Class (PFC) Roe claimed that the government's evidence of the victim's intoxication raised both due process and sufficiency concerns. *Id.* at *10–23. But the Army court held that the government may carry its burden of proving sexual assault without consent "by presenting, mainly but alongside other evidence, the fact of the victim's extreme intoxication at the time of the sexual act." *Id.* at 12. 1391–1417. This ruling is consistent with *Mendoza* because "[n]othing in [Article 120(b)(2)(A)] bars the Government from offering evidence of an alleged victim's intoxication to prove the absence of consent." *Mendoza*, 85 M.J. at *13.

B. The holding in *Roe* applies to this case.

The facts in *Roe* were similar to this case. The government charged and convicted PFC Roe on a "without consent" theory and did not charge the incapacitation statute. The victim was highly intoxicated and did not remember the sexual act. *Roe*, ARMY 20200144, 2022 CCA LEXIS 248, at *2–7. The Army court explained,

> The government could attempt to carry its burden of proving sexual assault without consent "by presenting, mainly but alongside other evidence, the fact of the extreme intoxication at the time of the sexual act." Thus, in that context, Roe was convicted of the offense "as charged and not some other uncharged offense [,]" thus

> mooting any due process concerns. Our sister appellate courts have reached the same conclusion on similar facts.

(JA 61–69). Similarly, in *United States v. Coe*, the Army court, sitting en banc, reconsidered its decision in light of *Mendoza* using the *Roe* analysis to find evidence *alongside* intoxication evidence to prove without consent. *United States v. Coe*, 84 M.J. 537, 541–42 (Army Ct. Crim. App. 2024) (en banc). In *Coe*, the Army court affirmed the conviction for sexual assault without consent. A majority found that the victim's testimony—which was corroborated by other witnesses—established that she was capable of consenting and did not consent; that eyewitness testimony "painted a picture of a victim who was capable of consenting before appellant penetrated her a second time, irrespective of her intoxication"; and that "nestled in [appellant's] admissions are statements indicating appellant knew the victim was capable of consenting to the second sexual encounter but did not . . . ." *Id*. at *15-17. This is indistinguishable from our case.

Like *Roe* and *Coe*, this case included both evidence of the victim's intoxication *and* other evidence of non-consent. While this Court held that it is insufficient to prove without consent by merely showing an incapacity to consent, *Mendoza*, 2024 CAAF LEXIS 590, at *22, this is not what happened in this case. Here, the evidence alongside the victim's intoxication evidence included: (1) the fact that she had no prior relationship with Appellee; (2) that she testified that she would have never consented to sex while menstruating; (3) she would not have

pushed a tampon so far inside herself; (4) the fact that she locked herself in Appellee's bathroom after the assault; (5) her immediate outcry at the CQ desk the next morning; and (6) Appellee's initial false exculpatory statements and evolving stories. (JA 61–69).

C. The Army court applied its *Roe* framework correctly.

As in *Roe*, the government used evidence of the victim's intoxication—alongside other evidence—to convict Appellee. (JA 61–69). But for the prosecutor's conflation of two legal theories—including one that was not charged— and the uncertainty in the military judge's application of the prosecutor's conflation, Appellee's conviction would not have been questioned.

Conclusion

WHEREFORE, the government respectfully requests this Honorable Court affirm the Army court's decision.

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CERTIFICATE OF COMPLIANCE WITH RULE 24(d)

1. This brief complies with the type-volume limitation of Rule 24(c)(1) because this brief contains **6,417** words.

2. This brief complies with the typeface and type style requirements of Rule 37. It has been typewritten in 14-point font with proportional, Times New Roman typeface, with one-inch margins.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was sent via electronic submission to the Defense Appellate Division at ***usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil*** on the 1st day of October 2025.

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